

ZONING BOARD OF APPEALS MEETING

August 10, 2010

MEMBERS PRESENT: Brian Boersma, Kim Arter, Gary Charles, John McDonnell and Bob Neis

MEMBERS ABSENT: None

ALSO PRESENT: Veronica West Recording Secretary, Dick Grenell Zoning Administrator, Rod Siegel Building Inspector, Roland Falkowski ZBA Alternate Member, Christina Achterhoff Twp Clerk, Brenda Moore Township Planning Consultant and Ordinance Enforcement Officer, Petitioner Lynn Dudek and approximately 25 to 30 interested citizens.

PURPOSE: Act on Zoning Variance Request No. 10-04 on the petition of Ruth Ann's Ice Cream at 605 Scenic Drive, Muskegon, MI 49445 to appeal the Township's administrative decision that outdoor music entertainment is not an accessory use to the present non-conforming use and to request a variance to allow the expansion of a non-conforming use, contrary to the provisions of Section 3.22.A.2 of the Laketon Township Zoning Ordinance.

Parcel# 61-09-008-300-0026-00 also known as 605 Scenic Drive.

Mr. Brian Boersma opened the public hearing at approximately 6:03 PM.

- The request for a variance was read by Kim Arter and with the attached site plan was entered as Exhibit A.

The following items were introduced and also entered as exhibits:

- Exhibit B – Chronicle notice of ZBA Hearing published Saturday July 10, 2010.
- Exhibit C – List of surrounding property owners within 300 feet notified of the variance request.

Chairperson Boersma asked if any communications had been received from the public regarding this hearing. Mrs. Arter stated she had received a phone call from Pat Shafer of 1401 Scenic Drive stating that while he was a supporter of the music he was not a supporter of expanding a non-conforming use at this location. Mrs. Arter also read a letter received on July 30, 2010 from Mr. & Mrs. Posthuma of 611 Scenic Drive. This letter is to be placed into the file and labeled Exhibit D.

Chairperson Boersma also asked if all members had been able to visit the Ruth Ann's Ice Cream property. All responded that they had been to visit the property.

Chairperson Boersma opened the meeting, explained the procedure to speak and turned the floor over to Brenda Moore who is the planning consultant and ordinance enforcement officer for Laketon Township. Ms. Moore explained the township became aware of the concert series via signs, the website and complaint calls. Ms. Moore also briefly summarized the history and the non-conforming status of this property. Ms. Moore informed those present that once aware of the situation, she conferred with the Township Zoning Administrator and the Township Attorney on the subject and then sent a letter informing Ms. Dudek the concert series could not take place. Ms. Dudek responded with a letter of her own and Ms. Moore sent another letter to Ms. Dudek, informing her again the concerts could not take place and suggesting if she disagreed with her determination, she could appeal the decision to the Zoning Board of Appeals.

Chairperson Boersma asked Ms. Dudek if she wished to add anything to her written petition. Ms. Dudek commented that perhaps she had made a mistake in advertising the music as a concert series and should have called it outdoor entertainment as the music is simply a few guitar playing friends and her. She added there has been live music at this location in years past.

Chairperson Boersma opened the floor for any of the public to speak in support of the request.

Janessa Smit the VP of Government Affairs from the Muskegon Chamber of Commerce spoke in support of Ms. Dudek and her request. She commented she was surprised to see the government against a small business. She also commented that Ms. Dudek's ice cream business is a unique tourist attraction for the area and Ms. Dudek is only trying to give a value added service and experience to her customers.

Bernie Berntson of 12 S Bear Lake Rd commented that Ruth Ann's is a special little place and feels that 24 hours of music out of 8000 hours in a year is a small request and feels her request should be approved.

Sharron Mathes of Muskegon, and former owner of Ruth Ann's Ice Cream stated when she owned the business she had a family of musicians that would play every night for 3 weeks. She added that she feels 2 hours per week should be allowed supports Ms. Dudek's request.

Kathy Tjapkes of 687 Scenic Drive commented in support of the request and stated she feels the parking issues can be addressed. She added that she hears the campers, barking dogs and chainsaws all the time and the music would enhance the neighborhood.

Nora Carson of 921 Scenic Dr said she has lived here for 30 years and would welcome the music.

Nancy Wells of 6149 West Lake Rd in Twin Lake stated she is a customer of the ice cream shop and would like to see the music allowed to go on. She added she feels the parking issues can be addressed and the government should encourage small businesses.

Richard Ballard of Muskegon, MI stated he supports the music at Ruth Ann's.

Tom Cotter of 10590 Lancelot Dr, stated he is a musician (not one scheduled to play at Ruth Ann's) and is in favor of the request to have live music.

Rob Pulver of 2025 12 Mile Rd, Rockford, MI, stated he has camped here as a child and now brings his own kids here to enjoy the State Park and Ruth Ann's Ice Cream. He added he was excited to hear of the music, then heartbroken when it was cancelled.

Louis Loga of Windflower Bay in Muskegon commented he was one of the musicians scheduled to play and added that he doesn't make any money playing he just enjoys it and supports Ruth Ann's request.

There were no other comments in support and Chairperson Boersma opened the floor to the public that wished to speak in opposition of the request.

Al Posthuma of 611 Scenic Drive stated he was the writer of the letter read at the start of the meeting. He commented that he noticed most of the speakers in support of the music did not live next to Ruth Ann's. He reiterated that the property is zoned residential, Ruth Ann's Ice Cream is a non-conforming use and no requests or permits were applied for in advance of the concert series being scheduled and the stage being built. He wondered what would happen if a variance is granted and what assurances the residents would have that it wouldn't get bigger each year since variances run with the land and not the owner.

Liz Posthuma of 611 Scenic Drive commented that no one has addressed the issue of bathrooms. She stated there have been people urinating at the end of her driveway already and she wondered what will happen when people longer to listen to the music?

David Edwards of 661 Scenic Drive commented that he enjoys the quiet natural setting of the neighborhood and doesn't want some one else's music imposed on him in his own home.

Kenneth Johnson of 685 Scenic Drive commended Ms. Dudek on keeping the property in a clean and neat fashion. He commented that he purchased his home 16 years ago because of there being residential zoning rules in place as he did

not want his home to end up in the middle of commercial activities. He added that he doesn't see the music adding any enhancement to the residents.

Bruce Walpole of 5309 Beechwood Dr asked who would regulate the music sound level and manage the parking if the music is allowed. He added that the area is residential and he thinks it should stay residential.

Ms. Dudek states she is not charging admission nor collecting any money for the music and thinks it is being overblown. She does not intended to have a concert like that at summer celebration but similar to that which occurs at Hobo's Tavern (in Laketon Twp, on the corner of Whitehall and Giles Roads). She also stated was told by a licensed builder a permit was not needed.

Ms. Moore stated she wanted to clarify that if the ZBA members agree with the petitioner and overturn the staff's decision and allow the music as requested in the appeal portion of the request then there can be no regulation of the music activities.

There were no further public comments in support the request.

Chairperson Boersma asked Building Inspector Rod Siegel to address the building permit issue. Mr. Siegel stated the building code requires buildings or structures to have a building permit prior to construction, with the exception of detached structures under 200 square feet in area. However, the township Zoning Ordinance requires structures 200 square feet in area or less to have a Zoning Compliance Permit to ensure the structure is meeting zoning requirements such as setbacks. Chairperson Boersma asked if this stage meets the required setbacks. Mr. Neis stated there is no way for the ZBA to know as no site plan was included with the appeal/variance request but that photos of the property show that several of the seating area picnic tables appear to be over the property line onto State Park property. It was noted that Mr. Posthuma's letter stated the stage is 16 inches from their property line.

Mr. McDonnell moved to close the public portion of the meeting. Mrs. Arter supported the motion. The motion carried by voice vote and the public portion of the meeting closed at 6:52 pm.

Chairperson Boersma reminded the ZBA there are 2 issues before them, the appeal of the staff decision and the request for a variance to expand a non-conforming use. Ms. Moore suggested the ZBA members address these two issues separately.

Mr. McDonnell asked Ms. Moore if legal counsel had been sought. Ms. Moore stated she had conferred with the Zoning Administrator Dick Grenell and Township Attorney David Bossenbroek and they both agreed with her opinion and letter to Ms. Dudek. Mr. McDonnell commented that he appreciates the public participation but is disappointed with the issue being portrayed as the Township being against small business and live music. He added he feels the staff acted appropriately.

Mr. Neis stated he feels the issue is black and white and staff was correct in their decision.

Mr. Charles commented that he is a small business owner and understands the difficulties small business face in difficult economic times. He added he can also see and understand both sides of the issue.

Mr. McDonnell moved to deny the appeal of the township staff's decision based on the following findings of fact:

Findings of Fact – Appeal of staff decision:

- The 8' x 12' (96 square foot) stage was constructed without a Zoning Compliance Permit
- Setbacks for stage are unknown as no site plan was provided.
- Construction of a structure is considered to be an expansion of the non-conforming use of the property.

Mr. Neis supported the motion.

Voting in favor of the motion: Mr. Neis, Mrs. Arter, Mr. McDonnell, Mr. Charles and Mr. Boersma

Voting in opposition of the motion: None.

The motion passed and the appeal is denied.

Chairperson Boersma re-opened the meeting for public comment on the request for the variance to allow the expansion of a non-conforming use.

Ms. Moore spoke to clarify the ordinance regulations by stating the ordinance allows the ZBA to approve an expansion of a non-conforming use by up to 25%. She also noted that there are other potential violations that need to be considered, such as the existing gazebo, as the records do not indicate when some of the existing things were constructed or installed. It appears there may be picnic tables encroaching on the State Park land. Ms. Moore suggested to the ZBA that if they are inclined to consider allowing an expansion they may need more detailed information such as a detailed site plan showing all structures on the property in relation to property lines as well as the seating area and parking area.

Chairperson Boersma asked Ms. Dudek if she built the gazebo. Ms. Dudek stated the previous owner was constructing the gazebo when she purchased the property in 1998. Ms. Dudek also added she has had music here in the past including the Reeths Puffer Choir this spring.

Ms. Smit of the Chamber of Commerce added that in her opinion she did not feel common sense had prevailed here and it is upsetting to think of all the ice cream cones Ruth Ann had to sell to pay the fee for this hearing so she can expand her client base and give her customers the added value of live musical entertainment as they enjoy their ice cream.

Ms. Dudek stated she feels her business has been there longer than many of the residents and the noisy campground next to her is out of her control.

Cathy Berntson of 12 S Bear Lake Rd stated Ruth Ann's is a favorite destination to take out of town guests and feels this is progress and wondered if there could be conditions to limit the frequency and level of noise but still allow the concerts.

Liz Posthuma of 611 Scenic Dr asked what would prevent the concerts from becoming more often than once a week if they are successful.

Ms. Moore suggested the ZBA may want to table their decision because the limit of a 25% expansion may already have been reached or even exceeded and it does not appear they have the necessary information in front of them to make that determination. She reminded them that the 1976 ordinance caused the non-conforming status and anything added after that may have been added without the proper approvals and should be included in the calculations to determine if the 25% expansion has already occurred. She added that the seating area, the parking area, the building and the gazebo would all be items to be looked at in determining the 25% expansion limit.

Mr. Neis reiterated that to be considered non-conforming, it must have been established legally, for example the gazebo appears to have been constructed in 1998, which was after the 1976 non-conforming status came into effect and would be an expansion.

There were no additional comments and Mr. McDonnell moved to close the public portion of the meeting. Mrs. Arter supported the motion. The motion carried by voice vote and the public portion closed at 7:15 pm.

Mr. McDonnell commented there is not enough information in this application to determine if the 25% expansion threshold has been met. Mr. McDonnell suggested the petitioner work with township staff to create an accurate site plan so the ZBA can see what exists & the sizes and locations of everything on the property.

Mr. McDonnell moved to table the decision on the variance request to allow the expansion of a non-conforming use until such time as Ms. Dudek provides an accurate site plan of the property showing the location of buildings, structures, parking areas, seating areas and all other improvements on the site.

Findings of Fact – Request for variance to expand a non-conforming use:

- The 8' x 12' (96 square foot) stage was constructed without a Zoning Compliance Permit
- No site plan has been submitted, sizes and locations of the existing building and other structures are unknown.
- Construction of the stage along with other past improvements, including the gazebo are undocumented as to when they came to be and the exact locations and sizes are unknown.
- Existing non-conformity occurred in 1976. Dates of improvements since then have not been provided.

Mr. Neis stated he feels Ruth Ann's Ice Cream had a stage built and concerts scheduled without any consideration given to the neighbors or the ordinances and he objects to the spin that is being put on the issue that the Township is against businesses and music. He added he feels Ms. Dudek brought the issue on herself by not checking into the rules and regulations prior to going ahead with her plans.

Mr. Charles and Mrs. Arter were in agreement and both expressed they can see both sides of the issue and feel they need more time and information before making a decision. Mr. Charles also suggested that the ZBA would need the advice and legal opinion of the Township Attorney before making a final decision.

Chairperson Boersma commented on the stage being built illegally without permits, that it does not appear to meet setbacks and would probably need to be removed.

Kim Arter supported the motion of Mr. McDonnell to table the decision on the variance request pending an accurate site plan being received from Ms. Dudek.

Voting in favor of the motion: Mr. McDonnell, Mr. Charles and Mrs. Arter

Voting in opposition of the motion: Mr. Neis and Mr. Boersma

The motion passed and the decision was tabled as stated in the motion.

Other business:

Mr. McDonnell moved to approve the minutes of the 07/27/2010 for the variance request of Mr. & Mrs. Compton as presented with two minor corrections to the date and petition number. Mrs. Arter supported the motion. The motion was approved by voice vote.

Mr. Neis suggested that meeting minutes be e-mailed to members after they approved so they can keep a file for their reference. It was noted that can be done, but that minutes are posted on the township website after approval as well.

Mr. McDonnell moved to adjourn the meeting. Mr. Neis supported the motion. The motion passed by voice vote.

The meeting adjourned at 7:28 pm

Submitted by: Veronica West, Recording Secretary